

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James Bowers,)	Civil Action No. 0:14-cv-0358-RMG
)	
Petitioner)	
)	
v.)	ORDER
)	
Leroy Cartledge,)	
Respondent)	
)	
)	
)	
)	

This matter is before the Court on Respondent's Motion for Summary Judgment. (Dkt. No. 14). As explained herein, the Court declines to adopt the Magistrate's Report and Recommendation ("R&R") (Dkt. No. 22), denies as moot Respondent's motion, and recommits the matter to the Magistrate Judge for further proceedings.

I. Background

James Bowers ("Petitioner") is currently a prisoner at the McCormick Correctional Institute. Proceeding pro se and in forma pauperis, Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) DSC, the matter was automatically referred to a Magistrate Judge for pretrial proceedings. Respondent filed a Motion for Summary Judgment (Dkt. No. 14) and a Return and Memorandum to the Petition (Dkt. No. 13), requesting that the petition be dismissed without prejudice for failure to exhaust state remedies since his petition for certiorari was still pending before the Supreme Court of South Carolina. Despite being issued a *Roseboro* order explaining that his case could be dismissed if he failed to respond, and a second order repeating the

admonishment, Petitioner has not entered a response to the motion. The Magistrate Judge issued the present R&R on July 22, 2014, recommending that the case be dismissed with prejudice for failure to prosecute. (Dkt. No. 22).

Petitioner was indicted in November 2003 for armed robbery (2003-GS-07-2097), and was found guilty and sentenced to life without parole under S.C. Code Ann. § 17-25-45(A), the “Two Strikes” law. He unsuccessfully appealed the conviction, then applied for post-conviction relief on May 23, 2008. His application was dismissed, he filed a Motion to Reconsider, and the motion was denied on December 21, 2009. (*Id.*) He petitioned the South Carolina Court of Appeals for review of the PCR denial and that petition was denied on June 19, 2013. He filed a Petition for a Writ of Certiorari to the South Carolina Supreme Court (Appellate Case No. 2013-002000) on November 11, 2013.

Petitioner filed this habeas petition on February 11, 2014, presenting the issue of ineffective assistance of counsel at trial, specifically with respect to an alleged error in classifying a prior conviction for assault with the intent to ravish as a “most serious” offense, which resulted in a mandatory sentence of life without parole pursuant to S.C. Code § 17-25-45(B). On May 19, 2014, Respondent filed a Motion for Summary Judgment and Return and Memorandum addressing the petition. (Dkt. No. 14). Respondent argued that since Petitioner’s appeal was still pending before the South Carolina Supreme Court, his petition should be dismissed without prejudice until he had exhausted his state remedies. (*Id.*). On July 22, the Magistrate Judge issued the Report and Recommendation recommending that the petition be dismissed with prejudice for failure to prosecute, as Petitioner had not yet responded to the Motion for Summary Judgment or the two subsequent orders requesting a response. On August

21, 2014, the Supreme Court issued an order denying certiorari on Petitioner's PCR appeal. (Order on Appellate Case No. 2013-002000).

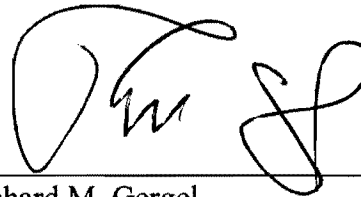
II. Discussion

In light of the recent action of the South Carolina Supreme Court denying certiorari on Petitioner's PCR appeal, the underlying basis of the Respondent's motion to dismiss is now moot. While the Court does not wish to encourage or sanction a litigant's failure to respond to the orders of the Magistrate Judge to respond to a pending dispositive motion, the interests of justice are best served under these circumstances by this Court denying Respondent's motion for summary judgment, declining to adopt the R & R of the Magistrate Judge and remanding this matter to the Magistrate Judge to address the petition on its merits.

III. Conclusion

For the reasons stated, Respondent's Motion for Summary Judgment (Dkt. No. 14) is hereby **DENIED** and the matter is recommitted to the Magistrate Judge for further proceedings.

IT IS SO ORDERED.



Richard M. Gergel
United States District Judge

September 22, 2014
Charleston, South Carolina